

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MARK ANTHONY BOYKIN,
Plaintiff,

vs.

CITY OF NORTH LAS VEGAS, and JOSEPH
CHRONISTER in his personal and official
capacity; and JAMES RANDOLPH SALYER,
Defendants.

Case No.: 2:09-cv-002373-RLH-GWF
Case No.: 2:10-cv-000737-RLH-GWF

O R D E R

(Motion to Dismiss—#38)

Before the Court is Defendants City of North Las Vegas, Joseph Chronister, and James Randolph Salyer’s **Motion to Dismiss** (#38, filed Jan. 13, 2011) the First Amended Complaint based on a failure to state a claim. The Court has also considered Plaintiff Mark Anthony Boykin’s Opposition (#48, filed Apr. 15, 2011), and Defendants’ Reply (#52, filed May 2, 2011).

BACKGROUND

This dispute arises out of Boykin’s allegedly wrongful firing from the North Las Vegas Police Department. Boykin was hired by the North Las Vegas Police Department (“Police Dept.”) in February 2007. He was then assigned to work with Field Training Officer Mario Perez

1 as a trainee. Boykin alleges that Perez treated African Americans differently than people of other
 2 races (specifically, checking African Americans for outstanding warrants) and commented on this
 3 observation to other trainees. Boykin alleges that after Salyer, who was in charge of training,
 4 learned of Boykin's concerns he simply suspended Boykin and convened a "Non-confirmation
 5 Board" to terminate him for dishonesty rather than investigating the situation. The Police Dept.
 6 fired Boykin in October 2007.

7 Boykin filed a complaint with the Eighth Judicial District Court for the State of
 8 Nevada on October 14, 2009, against the City of North Las Vegas and Joseph Forti in his official
 9 capacity. In his complaint Boykin alleged a First Amendment claim under 42 U.S.C. § 1983 and a
 10 separate claim under § 1981. The Court then consolidated this case with Boykin's separate Title
 11 VII case against North Las Vegas. Boykin then moved to amend his complaint on September 23,
 12 2010, which the Court granted on December 8. Boykin's amended complaint dropped Forti as a
 13 Defendant, added Chronister and Salyer as Defendants as to all claims, and added a Fourteenth
 14 Amendment due process claim against all parties.

15 Now before the Court is Defendants' motion to dismiss. Defendants request the
 16 Court dismiss all claims against Chronister and Salyer (the First and Fourteenth Amendment-based
 17 § 1983 claims and the § 1981 claim) and the Fourteenth Amendment and § 1981 claims against the
 18 North Las Vegas. They do not request dismissal of Boykin's First Amendment-based § 1983
 19 claim against the city. For the reasons discussed below, the Court grants Defendants' motion in
 20 part and denies it in part.

21 DISCUSSION

22 I. Legal Standard

23 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
 24 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short
 25 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
 26 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require

1 detailed factual allegations, it demands “more than labels and conclusions” or a “formulaic
 2 recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)
 3 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Factual allegations must be enough to rise
 4 above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a
 5 complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its
 6 face.” *Iqbal*, 129 S. Ct. at 1949 (internal citation omitted).

7 In *Iqbal*, the Supreme Court recently clarified the two-step approach district courts
 8 are to apply when considering motions to dismiss. First, a district court must accept as true all
 9 well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the
 10 assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only
 11 by conclusory statements, do not suffice. *Id.* at 1949. Second, a district court must consider
 12 whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A
 13 claim is facially plausible when the plaintiff’s complaint alleges facts that allows the court to draw
 14 a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where
 15 the complaint does not permit the court to infer more than the mere possibility of misconduct, the
 16 complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.* (internal
 17 quotation marks omitted). When the claims in a complaint have not crossed the line from
 18 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

19 However, the “documents ‘whose contents are alleged in a complaint and whose
 20 authenticity no party questions, but which are not physically attached’” to the pleading, may be
 21 considered in ruling on a Rule 12(b)(6) motion to dismiss. *In re Silicon Graphics Inc. Sec. Litig.*,
 22 183 F.3d 970, 986 (9th Cir. 2002) (superseded by statute on other grounds) (quoting *Branch v.*
 23 *Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)). Also, “on a motion to dismiss a court may properly
 24 look beyond the complaint to matters of public record and doing so does not convert a Rule
 25 12(b)(6) motion to one for summary judgment.” *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d
 26 1279, 1282 (9th Cir. 1986). Therefore, the Court may look to the collective bargaining agreement

1 between North Las Vegas and the North Las Vegas Police Officer's Association ("CBA") (Dkt.
2 #48, Ex. 1) and at the Nevada Local Government Employee-Management Relations Board
3 decision ("Board Decision") (*Id.*, Ex. 2) relating to this matter.

4 **II. Analysis**

5 **A. Section 1981 Claim**

6 Boykin's § 1981 claim fails. In their motion, Defendants seek dismissal of
7 Boykin's § 1981 and § 1983 claims. In his response to the motion, Boykin addressed his § 1983
8 claim but failed to defend the propriety of his § 1981 claim. The failure to oppose an issue
9 constitutes consent to the Court granting the motion to dismiss as to that issue. Accordingly, the
10 Court dismisses Boykin's § 1981 claim for failure to oppose. However, additionally, the Court has
11 reviewed the issue, finds merit in the motion as to the § 1981 claim, and would dismiss regardless
12 of the failure to oppose because Boykin's alleged activity is not protected under § 1981.

13 **B. Section 1983 Fourteenth Amendment Claim**

14 **1. Statute of Limitations**

15 Boykin's claims against Chronister and Salyer are barred by the statute of
16 limitations. Nevada's two-year statute of limitations period for personal injuries applies to this §
17 1983 claim. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). Boykin contends that his
18 claims are not barred because the statute of limitations does not begin to run until he knew or
19 should have known of Chronister and Salyer's involvement and that this issue is a fact question for
20 a jury. *Oak Grove Investors v. Bell*, 668 P.2d 1075 (Nev. 1983) ("When the plaintiff knew or in
21 the exercise of proper diligence should have known of the facts constituting the elements of his
22 cause of action is a question of fact for the trier of fact.") Here, Boykin simply argues that he did
23 not know of Salyer or Chronister's involvement until Salyer testified at the Nevada Local
24 Government Employee-Management Relations Board hearing in June of 2010. However, Boykins
25 presents no reason why he could not have found out this information in the two and a half years
26 between when he was fired and the hearing or explain why (or if) he did not search for this

1 information. *See Alires v. Crowther*, 279 Fed. Appx. 499, 500 (9th Cir. 2008) (determining that
 2 plaintiffs must act with reasonable diligence to ascertain the identities of defendants). Further,
 3 Boykins does not explain the three month delay between the hearing and moving to amend the
 4 complaint to add Chronister and Salyer as defendants. *See id.* (stating that plaintiffs could have
 5 identified defendants prior to official discovery through informal discovery or “other means.”)
 6 Accordingly, Boykin’s claims against Chronister and Salyer are barred by the statute of
 7 limitations.

8 **2. Qualified Immunity**

9 The doctrine of qualified immunity protects government officials from liability for
 10 civil damages to the extent their conduct does not violate clearly established statutory or
 11 constitutional rights of which a reasonable person would have known at the time of the conduct.
 12 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). This immunity is granted broadly and “provides
 13 ample protection to all but the plainly incompetent or those who knowingly violate the law.”
 14 *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir 1998) (quoting *Malley v. Briggs*, 475 U.S. 335,
 15 341 (1986)) “The protection of qualified immunity applies regardless of whether the government
 16 official’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law
 17 and fact.” *Pearson*, 55 U.S. at 231 (internal quotation omitted). The determination of whether an
 18 official is protected by qualified immunity should take place ““at the earliest possible stage in
 19 litigation.”” *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). Courts considering
 20 whether an official is shielded by qualified immunity consider two questions: first, whether the
 21 facts alleged show the officer’s conduct violated a constitutional right, and second, whether the
 22 right was clearly established. *Id.* at 232.

23 Even if Boykin’s due process claim against Chronister and Salyer was not time-
 24 barred, they would be protected by qualified immunity. Citing *Cleveland Board of Education v.*
 25 *Loudermill*, 470 U.S. 532, 545-46 (1985), Boykin argues that a Fourteenth Amendment right to a
 26 pre and post-termination hearing from government employment is clearly established. This may

1 be true as a general matter, however, where an employee is at-will or in a probationary status, they
2 do not have a property interest in their continued employment and therefore do not have a
3 Fourteenth Amendment due process claim. *See Board of Regents v. Roth*, 408 U.S. 564, 578
4 (1972).

5 Here, the North Las Vegas Municipal Code 2.68.290 clearly states that “Police
6 officers ... shall serve eighteen (18) months probation as a new hire” and “[d]uring the
7 probationary period, probationary employees may be separated at will for any reason not violative
8 of state or federal law and shall not have any entitlement to continued employment.” (*See also*
9 Dkt. 48, Resp. to Mot., Ex. 2, State of Nevada Local Government Employee-Management
10 Relations Board Order at 6–7 (holding that Boykin was a probationary employee under the
11 municipal code).) As a probationary employee, Boykin did not have a property interest in his
12 employment necessitating due process for termination. *See Bishop v. Wood*, 426 U.S. 341, 344-46,
13 348 (1976) (holding that the existence of a property interest in employment is determined by state
14 law). Boykin argues, however, that the Board’s decision was wrong on this point because of a past
15 practice of not putting new employees on probationary status. Boykin is appealing the Board’s
16 decision in state court. Regardless of the outcome of this appeal, it was at least not clearly
17 established that Boykin had a Fourteenth Amendment property right in his continued employment
18 because of the municipal code provision apparently making him a probationary employee,
19 terminable for any reason. Thus, Chronister and Salyer are entitled to qualified immunity even if it
20 turns out they were mistaken as to the law.

21 **C. Summary**

22 In sum, the Court dismisses Boykin’s § 1981 claim against North Las Vegas,
23 Chronister, and Salyer because Boykin failed to oppose the Defendants’ argument. The Court
24 further dismisses Boykin’s § 1983 claims against Chronister and Salyer as barred by the statute of
25 limitations and, as to the Fourteenth Amendment claim, because they are entitled to qualified
26 immunity. The Court, however, does not dismiss the Fourteenth Amendment claim as pled against

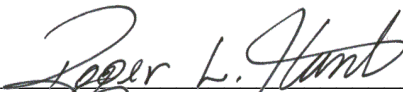
1 North Las Vegas. The Court finds that the North Las Vegas Municipal Code states that Boykin is a
2 probationary employee and the Board found that he was a probationary employee. Nonetheless,
3 the issue is on appeal and the Court hesitates to make a decision that could conflict with the state
4 court decision. Therefore, the Court declines to dismiss the Fourteenth Amendment claim against
5 North Las Vegas, but if the Board decision is upheld, the Court will be open to reconsidering this
6 denial upon a motion from North Las Vegas. Finally, North Las Vegas does not seek dismissal of
7 the First Amendment claim pled against it and the Court does not address that claim.

8 **CONCLUSION**

9 Accordingly, and for good cause appearing,

10 IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#38) is
11 GRANTED in part and DENIED in part as described in the Summary section of this Order.

12 Dated: August 30, 2011.

13
14 
15 **ROGER L. HUNT**
16 **United States District Judge**
17
18
19
20
21
22
23
24
25
26